

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN ANTHONY VELLA,

Petitioner,

No. CIV S-04-2399 MCE KJM P

vs.

PEOPLE OF THE STATE OF  
CALIFORNIA, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).<sup>1</sup> A waiver of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986).

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<sup>1</sup> A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 After reviewing the petition for habeas corpus, the court finds that petitioner has  
2 failed to exhaust state court remedies. None of his claims have been presented to the California  
3 Supreme Court. Further, there is no allegation that state court remedies are no longer available to  
4 petitioner. Accordingly, the petition should be dismissed without prejudice.<sup>2</sup>

5 Petitioner has requested the appointment of counsel. There currently exists no  
6 absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d  
7 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at  
8 any stage of the case "if the interests of justice so require." See Rule 8(c), Fed. R. Governing  
9 § 2254 Cases. In the present case, the court does not find that the interests of justice would be  
10 served by the appointment of counsel at the present time.

11 Good cause appearing, IT IS HEREBY ORDERED that petitioner's request for  
12 the appointment of counsel is denied; and

13 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of  
14 habeas corpus be dismissed for failure to exhaust state remedies.

15 These findings and recommendations will be submitted to the United States  
16 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
17 twenty days after being served with these findings and recommendations, petitioner may file  
18 written objections with the court. The document should be captioned "Objections to Findings  
19 and Recommendations." Petitioner is advised that failure to file objections within the specified

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24 <sup>2</sup> Petitioner is cautioned that the habeas corpus statute imposes a one year statute of  
25 limitations for filing non-capital habeas corpus petitions in federal court. In most cases, the one  
26 year period will start to run on the date on which the state court judgment became final by the  
conclusion of direct review or the expiration of time for seeking direct review, although the  
statute of limitations is tolled while a properly filed application for state post-conviction or other  
collateral review is pending. 28 U.S.C. § 2244(d).

1 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
2 (9th Cir. 1991).

3 DATED: May 4, 2005.

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6 UNITED STATES MAGISTRATE JUDGE  
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